(Caption omitted)

SUR MOTIONS FOR
DIRECTED VERDICTS

(Appearances omitted)

LEAHY, Senior District Judge.

The general nature of the case at bar was discussed in the denial of defendants' motion for summary judgment. 195 F.Supp. 337.

At trial, after plaintiffs rested, defendants made their motions under FR 50 for directed verdicts. "All the involved perambulations of the numerous decisions on this problem [a motion for directed verdict] are merely amplifications of ... two cardinal principles."[1] These are 1. without weighing the credibility of the witnesses, if there can be but one reasonable conclusion as to the verdict, the court should determine the litigation by directed verdict; and 2. where the evidence is conflicting or there is insufficient evidence to make only a "one-way" verdict possible, a directed verdict is improper. The function of the motion is to test the legal sufficiency of the evidence; it raises solely a question of law; and the court must resolve all conflicts against the defendant.[2] Thus, a directed verdict

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1. 5 Moore, Fed. Prac. §50.02 [1] pp. 2315-16.

2. 5 Moore, op. cit. p. 2317.

may not be justified, yet a verdict may be set aside as contrary to the preponderance of the evidence upon the later and different motion.

It has taken approximately 11 weeks for plaintiffs to put in their case. Ex necessitatae, the treatment of the motions for directed verdict will not lend itself to the nice and compact discussions I usually favor in the disposition of matters of law.

To test the validity of these present motions, argued at length by counsel, a review of the paper file, pretrial discovery papers, and the long transcript of the testimony, as well as the exhibits, is required.[3]

Analysis of the plaintiffs' direct case, and questions posed by it, follow:

ONE

DOW CHEMICAL COMPANY: As defendant

Defendant Dow is charged with violation of 15 USC §1 (Sherman Act) by conspiring with defendant Pennsylvania Paste in the latter's attempt to "destroy plaintiffs' business and thereby preserve Pennsylvania Paste's dominant

3. Plaintiffs took 41 trial days; the transcript comes to over 4973 pages; and there were in excess of 426 exhibits offered and ruled upon.

position in the wet paste manufacturing business in the Philadelphia area."[4]

Defendant Dow is charged with violation of 15 USC §§ 13, 14, 15 (Robinson-Patnam Act) by treating plaintiffs differently with respect to prices and credit than it did competitors of plaintiff.

I. ANALYSIS

DOW'S MOTIVE. (A) No contention is made that defendant Dow felt obliged to conspire for fear of reprisals by Pennsylvania Paste. In the Statement of Contentions and in the opening address to the jury, plaintiffs apparently contended that Dow's sole motive for its acts was that "it was not in Dow's interest to have in existence enforceable patents covering" plaintiffs' new use of methylcellulose, "since the holder of such a patent, if he had adequate financial resources, could effectively limit the production of all cellulose base paste."[5]

Yet, plaintiffs have conceded that Dow should not have felt constrained at selling Methocel CAM to Reardon or United Wallpaper Companies,[6] competitors with

4. Statement of Contentions, p. 6.
5. Statement of Contentions, p. 10; Opening Address of Plaintiffs, p. 13.
6. Tr. p. 1473.

plaintiffs, and that, in fact, Dow was free to sell Methocel to any manufacturer to be made into a wallpaper paste with a non-infringing formula for its competitive product to Calico,[7] plaintiffs' cellulose base paste. Any alleged motive of Dow to protect its sales is thus negated--unless plaintiffs now contend that Dow, uninformed as to the law, unwisely feared plaintiffs' control of "all cellulose base paste."

At argument on this motion, plaintiffs added the claim that a shortage of supply of CAM existed and that Dow considered it in its interest to sell its "favored" customers, Reardon and United, rather than plaintiffs.[7a]

DOW'S ACTS. (A) Dow is charged with selling Methocel to plaintiffs' competitors (1) at lower prices, (2) on better credit terms, and (3) with faster deliveries.[8] The specificities follow:

1. Plaintiffs apparently agree that Dow sold Methocel CAM to plaintiffs' competitors and Methocel NF to plaintiffs. The price for the former product was lower than for the latter. Plaintiffs' real objection seems to be that they were not told of CAM's existence by Dow in a clear manner and that they were not encouraged to buy it.[9] Do plaintiffs maintain that it was

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7. Tr. p. 1819.
7a. Tr. p.
8. Statement of Contentions, p. 10; Opening Address, p. 12.
9. Tr. p. 798, 1515.

Dow's obligation to encourage them to buy a cheaper product? Or that it was Dow's obligation to tell plaintiffs what products their competitors were buying for the same purpose as plaintiffs bought NF?

2. Plaintiffs' first contact with Dow in 1951 came when they were already losing money on Nix-Size.[10] When Dow took plaintiffs off 30 days credit they owed approximately $700 to Dow.[11] Three checks of plaintiffs had not cleared the bank, due, they claim, to Dow's cashing them prior to the date they promised them.[12] Plaintiffs claim that Dow gave Reardon and United more than 30 days to pay their bills,[13] but admits that they, the plaintiffs, had no information as to those two companies' credit rating.[14] They maintain that Dow should have reached some equitable accomodation with plaintiffs, but do they maintain that Dow was legally bound to do so, or that failure to do so is evidence of being part of a conspiracy to drive plaintiffs out of business?

3. Plaintiffs maintain that Dow sold them in dribbles and that they were forced to wait for Methocel even at times when they were willing to pay cash for it.[15] As this charge, if true, is

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10. Tr. pp. 1547-1548.
11. Tr. pp. 845-846.
12. Tr. pp. 1025-1027.
13. Tr. p. 882.
14. Tr. p. 1651.
15. Tr. p. 831.

apparently the result of the first two claims, it may have no separate identity as an alleged overt act. It is not, for example, referred to in the Statement of Contentions.

(B) Dow is charged with favoring the Reardon Co. by suggesting to it that it use Methocel CAM, a suggestion not made to plaintiffs.[16]

1. I find no support in the record for this charge. There is evidence that Reardon used CAM, but I find none that they did so on the basis of information not given to plaintiffs.

(C) Dow is charged with advertising Methocel as a base for non-staining wallpaper paste without stating in the ads that plaintiffs had a pending patent application.[17]

1. Is this conceivably an overt act of conspiracy? Is Dow required to place such information, if true, in its ads? Particularly with reference to plaintiffs' concessions, as stated supra?

(D) Dow is charged with early in 1957 refusing to sell the plaintiffs on any terms.[18]

1. The only support I find for this

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16. Statement of Contentions, p. 10.
17. Statement of Contentions, pp. 10,11.
18. Statement of Contentions, p. 11.

in the record is the statement of an unidentified man in Dow's Camden office to plaintiffs' Dovberg on the telephone to that effect.[19] May the jury properly find from this alone that Dow refused to sell plaintiffs on any terms?

II. SUMMA OF DIRECT TESTIMONY RE DEFENDANT DOW CHEMICAL COMPANY

A. DOW'S ALLEGED KNOWLEDGE

1. Dow is charged with knowledge of plaintiffs' dependence on Dow's methylcellulose as a prime ingredient in plaintiffs' cellulose base paste.[20]

2. Dow is charged with knowledge "of Pennsylvania Paste's campaign to drive plaintiffs out of business and of the retailers' cooperation in that campaign" and allegedly "knowingly cooperated and thereby conspired with Pennsylvania Paste in its efforts to drive plaintiffs out of business."[21]

B. DOW'S ALLEGED OVERT ACTS

1. Dow sold Methocel to plaintiffs' competitors in the cellulose base paste field at lower prices and on better credit terms than those which Dow offered to plaintiffs.[22]

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19. Tr. p. 996.
20. Statement of Contentions, p. 9.
21. Statement of Contentions, p. 10.
22. Statement of Contentions, p. 10.

2. Dow favored the Reardon Company, a competitor of plaintiffs over the plaintiffs "by suggesting that the Reardon Company use as a base for its cellulose paste a cheaper form of Methocel, which product Dow did not suggest in manufacturing their paste."[23]

3. "Dow nationally advertised the use of Methocel as a base for a non-staining wallpaper paste without stating that, as Dow knew..., plaintiffs had a pending patent application (and later a patent) covering this use of that product."[24]

4. "[E]arly in 1957...Dow refused to sell plaintiffs Methocel on any terms."[25]

C. DIRECT TESTIMONY*

Beginning in the fall of 1951, plaintiffs marketed Calico, a cellulose base paste[26] on which a patent was granted in 1955.[27] The major advantage of such a paste over wheat flour or flour-base paste was that a cellulose paste leaves no stain on the wall and does not discolor the mixing water.[28]

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23. Statement of Contentions, p. 10.
24. Statement of Contentions, pp.10,11.
25. Statement of Contentions, p. 11
26. Tr. p. 683.
27. Tr. p. 684.
28. Tr. p. 684.

* All following direct testimony unless otherwise specified, is that of Maurice Dovberg for plaintiffs.

Plaintiffs initiated the relationship with Dow by writing to them on May 18, 1951.[29] They purchased on four occasions from Dow in 1951, seven times in 1952, eight times in 1953, eleven times in 1954, eight times in 1955, and once in 1956.[30]

Plaintiffs attempted to procure other cellulose compositions before they found Dow's product and throughout the period in which they purchased Methocel they were satisfied with it.[31] On only one occasion throughout this period of purchases did plaintiffs complain to Dow about the quality of such Methocel after it was delivered. After receiving a few complaints from their customer-users about the consistency of Calico paste, plaintiffs wrote to Dow on September 1, 1953.[32] Three paragraphs of the letter read:

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> "I am urgently requesting prompt attention into the matter of why we get complaints from our distributors and some customers regarding the consistency of our Wallpaper Paste after being diluted.
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> ***
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> "I urge you to take this matter up with your technical department, so that we can be assured that our

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29. Tr. p. 692.
30. Tr. p. 707.
31. Tr. p. 710.
32. Tr. p. 818.

> Raw Material will yield a consistent liquid mixture Uniform in every respect, so that these reports that we get will not occur again. It should be noted that such reports unless eliminated through proper precautionary means on your part, could hurt us very seriously.
>
> "I wish to assure you that our batches are weighed and Mixed Homogenously under very strict controls, so that this difficulty goes back to Dow Chemical Company and should be corrected at once."

One of plaintiffs' basic contentions is that they purchased Methocel NF for a higher price than their competitors purchased Methocel CAM, a comparable product for use in a cellulose base paste. Methocel CAM would have performed satisfactorily in Calico paste.[33] In November 1951, plaintiffs obtained a sample of Methocel CAM and performed an experiment on it; it performed exactly as had Methocel NF.[34] But plaintiffs knew nothing of Methocel CAM's commercial availability at that time. Indeed, at no time prior to receipt of Dow's price list of June 13, 1956, did plaintiffs know that Methocel CAM, which sold for as little as 69¢ a pound, was commercially available.[35] Throughout the period,

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33. Tr. p. 777.
34. Tr. p. 766.
35. Tr. p. 798.

plaintiffs paid at least a figure of 86¢ a pound. Dow sold Methocel CAM to Reardon and United Wallpaper Company, competitors of plaintiffs, at the lower price, while selling the more expensive form of Methocel NF to plaintiffs.[36]

A second basic contention of plaintiffs is that Dow mistreated them with regard to their credit relationship. From the time they began doing business with Dow until June 1953, Dow sold them solely on a cash basis[37] while plaintiffs were forced to sell to their customers on credit.[38] Plaintiffs obtained their national distributor, Arthur S. Hoyt & Co. for Calico paste in the spring of 1952,[39] and from then to the early part of 1953 was when Pennsylvania Paste Co. and Samuel Schultz & Co. marketed their cellulose products "in identical package" forms.[40]

On April 25, 1952, plaintiffs' Dovberg had a conversation with Mr. Pyron of Dow -- "I pleaded ... that he request Dow ... to give us some more consideration in this matter, that we needed more material, that I told him at the time that we were selling on credit. I requested credit at that time, but, at any rate, in spite of my appeal, he told me he would have to take it up with his

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36. Tr. pp. 799-804.
37. Tr. p. 820.
38. Tr. p. 820.
39. Tr. p. 821.
40. Tr. pp. 821-822.

home office and advise me."[41] On October 24, 1952, Dovberg had another conversation with Pyron.

> "...I pointed out to Mr. Pyron that we had acquired a volume of distribution, that Methocel was our principal and primary constituent in this wallpaper paste, in this product, that we were manufacturing, that we were manufacturing on a national scale, that I had applied for a patent that incorporated these two ingredients that Dow was selling us.
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> "He registered surprise when I told him this. Our patents at that time were pending. He assured me that he would review this with his home office. He told me he would like to do whatever he could but that his hands were tied, and he also told me that he wasn't sure that his home office would do any better for us, because they had consistently decided that they were only going to sell us on a limited scale."

On June 19, 1953, Dow began to sell plaintiffs on 30 days credit.[42] Dovberg conversed with Pyron who told him Dow "isn't interested in selling me carload quantities, nor would they consider selling me truckload quantities, [30,000 or

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41. Tr. p. 823.
42. Tr. p. 828.

20,000 pounds] that I may as well continue to buy the way I am doing."[43]

Plaintiffs continued on 30-day credit until April 23, 1954.[44] During the period they purchased at 89¢ a pound; the carload or truckload price would have been 78¢ a pound. The limited credit policy constrained plaintiffs' activity and limited their ability to ship on time. The "Dow Chemical Company was holding us down, limiting our shipments. There were times when Methocel was critical, even when I was willing to pay for the quantity for cash or willing to pay before they would ship, and they would tell me that I would have to wait until a car would bring in a quantity into Philadelphia or until their shipment was replenished here in Philadelphia."[45]

In order to procure further Methocel plaintiffs had to ask Hoyt to pay them for Calico paste when plaintiffs still owed Hoyt money for dry paste purchases.[46]

Dow's inter-office memo of April 22, 1954 with respect to cutting off plaintiffs' credit stated that plaintiffs owed Dow $730.75. All moneys owed Dow were repaid.[47]

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43. Tr. p. 829.
44. Tr. p. 830.
45. Tr. p. 831.
46. Tr. p. 842.
47. Tr. pp. 845-846

In order to obtain cash to pay Dow, after being taken off a credit basis, plaintiffs began packaging their dry paste products themselves.[48] Throughout the period, plaintiffs' desire was for Dow to allow them to draw parts of carload and truckload lots, at equivalent prices, and in return to obligate themselves to eventually take a whole carload or truckload, etc.[49]

In the spring of 1954, plaintiffs' Dovberg told Mr. Pryon, of Dow, that Dow's cutting off his credit was "throttling our business";[50] that Calico and Nix-Size were plaintiffs' two big products, and that Dow was hurting them with respect to Calico at the same time Pennsylvania Paste Co. was hurting them with respect to Nix-Size. "I said ... [Pennsylvania Paste Co.] was reducing us, they were imitating our products. The owner of this company threatened to put us out of business, and that there were others who through this paste manufacturer were also hurting us, and this was taking a frightful toll of our business and reducing our cash. I pointed out to Mr. Pyron that if this condition continued and if Dow Chemical Company doesn't give us consideration that they would be contributing from an opposite direction to help this local paste manufacturer and those who were doing us serious harm to achieve for that company,

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48. Tr.p. 859.
49. Tr.p. 876-878
50. Tr.p. 879

for those others, the same purpose, to destroy our business, to put us out of business."[51]

Dow's cutting off plaintiffs' credit hurt at a critical time with respect to sales of Calico. In 1951, Dovberg sold $383.82 of Calico; in 1952 - $2471.00; in 1953 -$3414.00; in 1954 - $2593.65; in 1955 - $2237.10; in 1956 - $363.00.[52]

Throughout the period, Dow sold to United Wallpaper Co. and Reardon Wallpaper Co. on credit, was often not paid until over 30 days from date of delivery, and never cut off credit to those companies.[53]

Hoyt complained to plaintiffs' Dovberg about the latter's inability to send Calico and numerous orders were cancelled in 1954. Dovberg offered Hoyt a chance to buy $2000 worth of Calico in advance, to be drawn as Hoyt wanted it, and the offer was refused by Hoyt.[54]

Numerous orders from 1955 were cancelled because of plaintiffs' inability to supply Calico.[55] Numerous orders from 1956 were similarly cancelled.[56] Indeed, on only one occasion in 1956 was Dovberg able to buy from Dow.[57]

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51. Tr. p. 880
52. Tr. pp. 885-886.
53. Tr. p. 882.
54. Tr. pp. 888-907.
55. Tr. pp. 914-922.
56. Tr. pp. 926-932.
57. Tr. p. 932.

In September 1956, plaintiffs' Dovberg drove to Michigan for the purpose of speaking with the president of Dow Chemical Company, Dr. Doan.[58] He called Dr. Doan at his home on the telephone and told him he wished to speak with him personally.[59] After telling Dr. Doan of the urgent nature of his visit, "I told Dr. Doan that certain circumstances led to this and that there were others who had throttled my business, who had attempted to wreck my business and because of the persistent policies of Dow Chemical Company it appeared to me as though they were helping those to put me out of business and that if I couldn't effect some understanding between Dow Chemical Company and ourselves ... that I would lose my business and if that happened, I would be obliged to hold the Dow Chemical Company fully responsible."[60] Dr. Doan refused to speak with Dovberg personally and Dovberg returned to Philadelphia.[61]

On September 24, 1956 Dovberg wrote to Dr. Doan offering a sale of his patents for adhesives and paste or gum preparations.[62] The offer was rejected.[63] Soon after, desperate, plaintiffs' Dovberg proposed merger with Pennsylvania Paste,[64] which rejected it.[65]

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58. Tr. p. 956a
59. Tr. p. 960.
60. Tr. p. 961.
61. Tr. p. 962.
62. Tr. p. 963.
63. Tr. p. 986.
64. Tr. p. 987.
65. Tr. p. 988.

About October 23, 1956 plaintiffs' Dovberg had a meeting in his factory with Mr. Grow of Dow.[66] He told Grow of Pennsylvania Paste's conspiracy and that "from opposite directions" Dow was helping to effectuate the same policy.[67] He told Grow of his wish for credit from Dow and for local agency rights to Methylcellulose.[68] On November 16, 1956, Dovberg received a letter from Dow denying all charges and saying there was nothing they could do for him.

In the spring of 1957, plaintiffs' Dovberg called the office of the manager of the Camden sales office of Dow. He spoke with someone there and was told that Dow didn't wish to do any business with him.[69] Any business plaintiffs would have done with Dow would have had to be on credit at the quantity price.[70] Plaintiffs attempted to buy Methocel on credit from Philips & Jacobs Co., but after speaking with Dow, Philips & Jacobs Co. refused to sell to plaintiffs on credit.[71]

Plaintiffs shut their factory late in 1957.[72]

On February 21, 1958, Mr. Widua of Dow wrote a letter detailing plaintiffs'

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66. Tr. p. 989.
67. Tr. p. 990.
68. Tr. p. 991.
69. Tr. p. 996.
70. Tr. p. 998.
71. Tr. p. 1016.
72. Tr. p. 1011.

Dovberg's complaints to Dow's home office.[73]

In the whole of plaintiffs' relationship with Dow, three checks of the former did not clear. Plaintiffs' Dovberg had been promised by Mr. Pyron that they would not be cashed until a later date, but all were cashed earlier than the promised date. Plaintiffs speedily paid them back and made good on the obligation.[74]

Plaintiffs received a letter dated April 14, 1958 from Dow denying all charges.[75] The letter concluded with an offer to plaintiffs to answer it and "present any additional facts of which you are aware which might allow us to clarify this matter."[76] But plaintiffs' Dovberg, out of business and distrustful of Dow's intent, did not reply.[77] Suit was instituted against Dow in September 1958.[78]

D. CLARIFICATION OF DOW'S ACTS ON THE CROSS EXAMINATION

There is no contention that Dow should not have sold Methocel CAM or any other type Methocel to United Wallpaper, Reardon, or anybody else[79] or that Dow should not have sold Methocel to any

73. Tr. pp. 1022-24, 1027-29.
74. Tr. pp. 1025-27.
75. Tr. pp. 1030-37.
76. Tr. p. 1037.
77. Tr. p. 1037, but see, infra, footnote 102a.
78. Tr. p. 1037.
79. Tr. p. 1473.

wallpaper paste manufacturer to be made into a wallpaper paste with any formula which did not infringe on Dovberg's Calico patent.[80] The Calico patent itself refers not to Methocel (Dow's product), but to methylcellulose.[81]

The difference in cost between Methocel purchased by plaintiffs in 1951 and Methocel CAM was approximately $100.[82]

After plaintiffs obtained a sample of Methocel CAM, plaintiffs' Dovberg tested it and it worked satisfactorily, but no one talked price to him or told him how he could make any saving on it, and so he ordered none of it.[83]

Cellu-Stick, Pennsylvania Paste's product, was never analyzed by plaintiffs; nor was United Wallpaper's "Nancy Warren"; nor was Reardon's Supercel[84] to determine what type methylcellulose was in them. Plaintiffs knew nothing of the cost of production to any of the three manufacturers.[85] Dovberg made no inquiry as to what source the manufacturers of 15 to 20 other pastes got their methylcellulose or other such product from. Competition, originally from Cellu-Stick and then from the others,

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80. Tr. p. 1819.
81. Tr. p. 1503.
82. Tr. p. 1501a.
83. Tr. p. 1515, 1516.
84. Tr. pp. 1517, 1518, 1519.
85. Tr. pp. 1524-1530.

forced plaintiffs to reduce their price for Calico from 47¢ to 33¢ and then even lower.[86]

When plaintiffs first wrote Dow with respect to shipments of Methocel in 1951, they had already lost money in 1950 and 1951 on Nix-Size.[87]

Plaintiffs never gave Mr. Pyron a financial statement,[88] nor did they give requested business information to Dun & Bradstreet.[89] Plaintiffs' Dovberg sent Arthur S. Hoyt & Co. one financial statement, but a letter from Hoyt of October 29, 1952 comments that Dovberg's statement was neither signed, nor up to date, nor accurate.[90] Dovberg never sent another one[91] despite frequent requests from Hoyt. By July 29, 1954, plaintiffs had no intention to send Hoyt any financial statement, though asked to do so?[92] Plaintiffs continued behind in payments to Hoyt throughout 1954 and 1955[93] and on at least one occasion a check sent to Hoyt failed to clear.[94]

At the time Dow cut off plaintiffs' credit, three bills were outstanding totalling approximately $700. One was

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86. Tr. p. 1520.
87. Tr. pp. 1547, 1548.
88. Tr. p. 1599.
89. Tr. p. 1604.
90. Tr. p. 1676.
91. Tr. p. 1681.
92. Tr. p. 1789.
93. Tr. p. 1797.
94. Tr. p. 1737.

more than 30 days outstanding; one approximately 60 days, and the other more than 60 days.[95] One of the three invoices was paid about 4 months after due date; the other two about 3 months.[96]

The highest amount ever loaned plaintiffs by a bank at any time was $2650[97] and the bank credit generally was for $2000 at a time.[98] At the same time plaintiffs were seeking to get credit from Dow, Hoyt was requesting payment from plaintiffs for amounts owed it.[99] Plaintiffs' Dovberg finally made an arrangement (after the latter had rejected plaintiffs' overture to finance them up to $2000 at a time) that when Hoyt sent plaintiffs an order it would precede the order by a check so that plaintiffs could buy raw materials.[100]

Plaintiffs' Dovberg has no information with respect to the credit standing of United Wallpaper or Reardon Co.[101] He does not know what the mark-up was that Philips & Jacobs quoted to him.[102]

Plaintiffs' Dovberg did reply to Dow's letter of April 14, 1958. On June 9, 1958, Dovberg wrote to Mr. W. R.

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95. Tr. p. 1624.
96. Tr. p. 1626.
97. Tr. p. 1643.
98. Tr. p. 1833.
99. Tr. p. 1649.
100. Tr. p. 1703.
101. Tr. p. 1651.
102. Tr. p. 1855.

Dixon, the General Sales Manager of Dow, and complained once more of Dow's activities.[102a] The letter said in part:

> "Your investigation should also have disclosed that, after certain of our competitors commenced their non-licensed manufacture of our Paste Products, Dow consistently furnished certain of our competitors with Methycellulose at prices which were lower, and on credit terms which were better, than those which Dow offered us, and that Dow finally refused to sell us any Methycellulose whatever. Your investigation should have also disclosed that these actions by Dow, together with those of our unfair competitors, finally forced Paste Company of America and Dovberg Chemical Company to cease doing business in the Spring of 1957, despite the fact that we then had a substantial volume of unfilled orders.
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> "I believe, Mr. Dixon, that your letter, with its distorted and - in certain instances - untrue recitals of fact was not written for any bona fide purpose, but in the hope that, should I fail to answer it, Dow would point to my silence as an indication of the accuracy of your recital. Since it is perfectly clear,

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102a. Tr. p. 1867; DX-Dow 79.

that nothing can be gained by further meetings or correspondence, I have just referred this matter to our attorneys."

Dovberg made no mention of Methocel CAM in the letter of June 9, 1958.

E. RE-DIRECT AND RE-CROSS EXAMINATION, etc.

In 1952 plaintiffs' Dovberg made various changes in the formula he used for Calico paste and no longer manufactured according to the patented formula.[103] The reason plaintiffs didn't borrow $20,000 or whatever amount was necessary to obtain a carload or truckload of Methocel from Dow was that the bank would not loan plaintiffs such a large amount and, according to Dovberg, Dow wanted plaintiffs as a small rather than a large customer.[104]

Between February 1, 1951 and June 21, 1954, plaintiffs purchased on credit 43 times from Arthur S. Hoyt & Co., and made good on all such obligations.[105]

In January 1951 plaintiffs sent to Hoyt a complete and accurate financial statement as to the original state of the company business.[106] The reason one was not sent after that was that the business was "beset by great difficulties as the

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103. Tr. p. 1924.
104. Tr. p. 1978.
105. Tr. p. 1993.
106. Tr. p. 2017.

result of what these defendants did ... and ... I was reluctant to give out any statement" which would show how low in cash the business was.[107]

It is apparently stipulated by Dow that two portions of Methocel CAM is required to give the same result as one portion of Methocel NF.[108]

Plaintiffs did not buy Hercules CMC (utilized in Pennsylvania Paste Company's Cellu-Stick) because they did not want the salt content in it. They did not know the price of CMC[109] nor whether it was available without salt.[110] They did not know the percentage of salt in the CMC product of Pennsylvania Paste Company compared to Calico.[111]

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107. Tr. p. 2017.
108. Tr. pp. 2169, 2170.
109. Tr. p. 2269.
110. Tr. p. 2270.
111. Tr. p. 2271.

TWO

PENNSYLVANIA PASTE COMPANY: Another defendant

Pennsylvania Paste is charged with violation of 15 USC §1 (Sherman Act) by conspiring with the other defendants to destroy plaintiffs' business "and thereby preserve Pennsylvania Paste's dominant position in the wet paste manufacturing business in the Philadelphia area."

Pennsylvania Paste is charged with violation of 15 USC §2 (Sherman Act) in its attempt to maintain its "dominant position in the wet paste manufacturing business in the Philadelphia area."

I. ANALYSIS

A. THE OVERT ACTS

1. Pennsylvania Paste is charged with marketing Liqui-Size, "a wall size eliminator, whose form, composition and packaging were in imitation of plaintiffs' Nix-Size."[112] Extensive direct evidence was introduced to prove Pennsylvania Paste's intent to make an imitation of Nix-Size and that Liqui-Size was in fact such an imitation.[113]

2. Pennsylvania Paste is charged with distributing wholesale a non-staining cellulose paste "whose form, composition and packaging" were similar to those

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112. Statement of Contentions, p. 7.
113. Tr. pp. 244, 247, 426.

of plaintiffs' Calico Paste.[114] At a later point in the trial, however, plaintiffs conceded that the Cellu-Stick product, its manufacture and sale, was not alleged to be an overt act to prove the alleged conspiracy.[115]

3. Pennsylvania Paste is charged with marketing Liqui-Size at prices sometimes below cost for the "primary purpose of causing loss" to plaintiffs.[116] Extensive expert testimony was given in support of this charge by plaintiffs' Dovberg as to costs of manufacture.[117]

4. Pennsylvania Paste is charged with inducing retailers to cease purchasing plaintiffs' products by "threatening to deprive them of their source of supply of wet paste" as soon as plaintiffs were forced out of business, and of engaging in a campaign to "destroy the confidence of retailers in plaintiffs and their products" by spreading false rumors about the inadequacy of the products and of the likelihood of plaintiffs being forced out of business.[118] Extensive testimony was given by plaintiffs' Dovberg in support of these charges.[119] While the great bulk of it was hearsay, there does appear to be a modicum of direct

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114. Statement of Contentions, p. 7.
115. Tr. p. 2573.
116. Statement of Contentions, p. 7.
117. See Tr. pp. 267, 357-364, 384-396, 396-406, 409-412, 423, 439-442, 3528-3541, 3616 et seq., 3667 et seq.
118. Statement of Contentions, pp.7, 8.
119. Tr. pp. 289-353, 414-421.

testimony admitted to raise a substantial issue of fact as to the truth of the allegation.

II. SUMMA OF TESTIMONY RE DEFENDANT PENNSYLVANIA PASTE COMPANY

A. THE CHARGE

(A) "Plaintiffs' basic contention of law is that Pennsylvania Paste conspired with the other defendants to destroy plaintiffs' business ..."[120]

(B) " ... and thereby preserve Pennsylvania Paste's dominant position in the wet paste manufacturing business in the Philadelphia area."[121]

B. DIRECT TESTIMONY

1. Wet Paste Products

Plaintiffs began putting wet paste products on the market in 1950. Deliveries were made in butter tubs on a deposit basis, but plaintiffs found consistently that the empty tubs were not at their customers' places to pick up. Plaintiffs' Dovberg received reports from his customers as to why they weren't there[122] and he called Flanagan (of Pennsylvania Paste) on the phone on

120. Statement of Contentions, p. 6.
121. Statement of Contentions, p. 6.
122. Tr. p. 230.

September 12, 1950.[123] In the phone call, he "told Mr. Flanagan that when I call on dealers I find that our paste tubs are disappearing and that I am being told that his drivers are picking them up, and I asked Mr. Flanagan to see to it that this condition ceased."[124] Flanagan denied the charge.

On November 7, 1950, plaintiffs made their first purchase of fiber drums to replace the butter tubs in which they had been delivering wet paste. Pennsylvania Paste Company quickly followed suit and Dovberg observed fiber drums being used by Pennsylvania Paste for their deliveries on December 10.[125] Each fiber drum cost $1 and plaintiffs would return 35¢ on each drum returned by his customers.[126] As with the butter tubs, the fiber drums were not returned and in the spring of 1951[127] he called Flanagan on the phone to report to him what he had heard about the loss of the drums. Out of 50 tubs that plaintiffs owned, 2 broke after normal usage.[128] Flanagan denied his drivers were taking the drums. Dovberg went to Flanagan's factory, looked inside, and saw Pennsylvania Paste fiber drums[129] beside "our fiber drums clearly marked and identified"[130] and

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123. Tr. p. 231.
124. Tr. p. 231.
125. Tr. p. 248.
126. Tr. p. 235.
127. Tr. p. 236.
128. Tr. p. 2935.
129. Tr. pp. 237, 2939.
130. Tr. p. 235.

butter tubs which belonged to plaintiffs.

Plaintiffs, unable to take further losses on the fiber drums, were soon forced to discontinue sales of wet paste products [131] by March 1951.[132]

2. Nix-Size

On September 12, 1950, Dovberg had a telephone conversation with Flanagan[133] "I told Mr. Flanagan[134] that I had reports that he had analyzed our Nix-Size ... and that he was planning to come out on the market with a similar product. During this conversation, Mr. Flanagan said, 'I understand that you people are manufacturing ... wet paste ... I would sooner drop dead on the street than lose one customer to you people ...' He also stated that as long as we continued to manufacture paste, he was determined to imitate any product that we manufactured and put on the market, that he could reduplicate and manufacture any product that we make as our product, he could afford to out produce us, undersell us, even continue to suffer losses until such time as he would put us out of business and then he could recover ... that he had the production capacity,[135] that he had the money, and that he would put an end to us and put us out of business."

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131. Tr. p. 238.
132. Tr. p. 2433.
133. Tr. p. 241.
134. Tr. p. 243.
135. Tr. p. 243a.

On October 20, 1950 Dovberg noted that Flanagan had entered the market with Liqui-Size, a competing product to plaintiffs' Nix-Size.[136] Dovberg procured a sample and brought it to Usona Bio-Chem Laboratories to have it analyzed[137] without telling the chemist it was Liqui-Size.[138] From its entry into the market, Liqui-Size looked like Nix-Size.[139] Nix-Size was being sold in pints and quarts and Liqui-Size in pint bottles.[140] Directions on both bottles were similar as to how much eliminator to add to obtain the same result.[141] Liqui-Size was sold in a flat flask-like bottle; Nix-Size in a Boston amber brown bottle.[142]

On December 20, 1950, Dovberg sent to Flanagan, by registered mail, a letter, of which he has the return receipt;[143] the first four paragraphs read:

> "As the beginning of a new year approaches, I wish to remind you that on September 12 and October 19th this year, I called you on the telephone and appealed to you to permit us to carry on our Business, by acting on friendly and fair competitive means.

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136. Tr. p. 244.
137. Tr. p. 245.
138. Tr. p. 246.
139. Tr. p. 247.
140. Tr. p. 247.
141. Tr. p. 248.
142. Tr. p. 247.
143. Tr. p. 261.

These telephone calls were prompted by the fact that I am well familiar with your ruthless tactics and unscrupulous tactics which has been put forth for years against small paste company's like ourselves.

"Thus far, your tactics have not changed. Your actions against any small Paste Company have always been just what your game is to-Day. Only last September you told me over the telephone that your proposed soon, to manufacture anything similar in product or Container that the Paste Company of America has on the Market. To be honest, I didn't believe you until in October you proved that you were very sincere.

"First you followed us with similar fibre - Paste Containers retaining the same non-profit quotation as for the wooden tub of paste, knowingly - that the fibre container holds 1 1/2 quarts paste more than the tub. This quotation not only prevents us from using the fibre drum, since we cannot compete to lose, but it is also impairing our business.

"I also regret, that after having Nix-Size annalized, you placed on the marked Liqui-Size, which is the closest resemblance to Nix-Size that I Know. And - to top off this Diabolicol act, you Personally solicited Liqui-Size, Promoting it as 'just like Nix-Size.' This inexcusable tactic, promoted with Free-Givaways and sold

at a lesser price than Nix-Size - Has already taken its Toll. Not only do you dare to infringe but you are tempted to destroy the original product which prompted you to seek the ways and means to reduplicate it."

No reply of any sort was ever received to the letter.[144]

Until Liqui-Size was sold on the market, plaintiffs sold Nix-Size for $4.20 a dozen and $4 a dozen to dealers when they bought one gross or more.[145] Pennsylvania Paste's Liqui-Size commenced to sell for $3.75 a dozen. On March 9, 1951 it was reduced to $3.50 a dozen, with a 10% discount on gross purchases[146] and such price continued through 1952.[147] Nix-Size sales fell off.[148] Ten examples of such cessation follow:

(a) Modern Wallpaper Company, which had twice purchased Nix-Size, ceased further purchases and the store manager told Dovberg that "he gets favors from Mr. Flanagan and that he could not say no to him."[149]

(b) The Philadelphia Wallpaper Company was a frequent purchaser of Nix-Size.[150] On December 4, 1950

144. Tr. p. 266.
145. Tr. p. 267.
146. Tr. p. 412.
147. Tr. pp. 378, 379.
148. Tr. p. 269.
149. Tr. p. 289.
150. Tr. pp. 294, 296, 299, 300.

Dovberg was told by one of their salesmen that Pennsylvania Paste Company had told them that "they had an exact duplication of Nix-Size,[151] and that the Pennsylvania Paste Company had loaded them up with a supply and requested that if anybody asked for Nix-Size to sell this as Nix-Size." After this conversation, sales to the Philadelphia Wallpaper Company dwindled[152] and soon ceased.[153] On June 18, 1951 Dovberg had a conversation with the manager of the Camden store of Philadelphia Wallpaper Company, in which the latter said "the owners of Pennsylvania Paste Company gives me money to push his product."[154]

(c) Southwest Wallpaper Company was a frequent purchaser of Nix-Size[155] throughout 1950. On July 8, 1951, Dovberg wrote a memo stating: "The owners of Southwest Wallpaper Company told me today that Pennsylvania Paste Company is making the exact thing as Nix-Size for us, under our own label. We are not going to buy Nix-Size after this order."[156] No order was placed after this[157] and Southwest began to sell Liqui-Size.[158]

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151. Tr. p. 303.
152. Tr. pp. 303, 304.
153. Tr. p. 308.
154. Tr. p. 308.
155. Tr. pp. 309, 318.
156. Tr. p. 314.
157. Tr. p. 315.
158. Tr. p. 316.

(d) Crown Wallpaper Company purchased in 1949 and 1950 from plaintiffs.[159] In December 1950, Max Forman, the owner of Crown, told Dovberg that "Mr. Flanagan was in to see him and asked him not to handle our products, that he would let him have his Liqui-Size for less, that it was the same thing as Nix-Size. After this conversation, purchases dwindled, then ceased.[160]

(e) Cohen Brothers Paint & Wallpaper Company purchased Nix-Size in 1950 and 1951.[161] Dovberg was forced to lower the price to compete with Liqui-Size[162] and had a conversation with the owners in which they "urged me to try to sell them for the same price as Pennsylvania Paste was charging or else they would have to discontinue buying."[163] After the conversation, only one more purchase was made of Nix-Size before complete cessation of buying, and Dovberg observed that Cohen Brothers sold Liqui-Size.[164]

(f) Albert's Wallpaper Co. did business with Dovberg in 1950.[165] Dovberg was told by the owners on March 28, 1950 of rumors that Pennsylvania Paste Co. was "going to put us out of business if we didn't stop selling wet paste."[166] On November 28, 1950,

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159. Tr. pp. 315-320.
160. Tr. p. 324.
161. Tr. p. 325.
162. Tr. p. 325.
163. Tr. p. 327.
164. Tr. p. 328.
165. Tr. p. 328.
166. Tr. p. 329, 330.

Dovberg was told by the proprietor "that Mr. Flanagan[167] called him and told him that he would sell .... Liqui-Size on open terms and that he could deliver as much as he wanted. Albert also said that Mr. Flanagan ... would put us out of business if we continued to ... manufacture and sell wet paste." Sales to Albert's slumped in 1952 to 8 cases of Nix-Size from 27 the year before, and 23 the year before that.[168] On December 9, 1952 Dovberg noted Liqui-Size on sale at Albert's store. He remarked on this to Albert, and Albert said, "Oh, Pennsylvania Paste Company's owner was around here and left this free of charge. They just left Liqui-Size and said go ahead and sell it, it is the same thing as Nix-Size, and the proceeds of these sales you can keep."[169] Sales slumped in 1953 to 4 1/2 cases, then ceased in 1954[170] with a final purchase by Albert on November 15. Liqui-Size continued to be sold in Albert's store.[171]

(g) J. Levitas Wallpaper Co. purchased from Dovberg in 1950-51.[172] Dovberg had a conversation with them in March 1952 and was threatened with a cessation of all purchases and subsequent purchases only of Liqui-Size, unless a price cut was made in Nix-Size.[173]

167. Tr. p. 333.
168. Tr. p. 337.
169. Tr. p. 339.
170. Tr. p. 343.
171. Tr. p. 343.
172. Tr. p. 345.
173. Tr. p. 347.

Morris Levitas told him that Pennsylvania Paste had left Liqui-Size for free "and told him to sell that in preference to Nix-Size, that not only would he sell it to them for less, but it would afford them a more substantial profit." Flanagan was further reported to have told them not to buy "our paste, that most of the stores don't like our paste, and that they ought to buy from Pennsylvania Paste Company."[174] Sales dwindled through 1953-54 and ceased in 1955.

(h) Ivry Wallpaper Co. purchased Nix-Size in 1949[176] and 1950.[177] In March 1951, Dovberg had a conversation with Milt Ivry, the proprietor, with respect to Liqui-Size on sale in Ivry's store. Ivry said, "Pennsylvania Paste Company left it here and told me to push it. It's the same thing as Nix-Size, and I can get it from Pennsylvania Paste Company cheaper."[178] Orders dwindled.[179] On October 6, 1951, Mrs. Ivry told Dovberg that Flanagan had attempted to convince them to cease buying Nix-Size, "that he assured them that he had the same thing, that he could sell it to them cheaper."[180] Plaintiffs were forced to cut their price and even with a price cut Ivry purchased less and then ceased purchasing Nix-Size, after which it continued to sell Liqui-Size.[181]

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174. Tr. p. 347.
175. Tr. p. 348.
176. Tr. p. 349.
177. Tr. p. 350.
178. Tr. p. 351.
179. Tr. p. 351.
180. Tr. p. 352.
181. Tr. pp. 353, 352.

(i) Square Deal Wallpaper & Paint Company was a customer of Dovberg in 1950-51. On March 7, 1951, Eddie Spivak, of Square Deal, told Dovberg that Pennsylvania Paste's Flanagan had been in to see him and had told him that Nix-Size "wasn't any good."[182] After that conversation, Dovberg was forced to cut his price on Nix-Size to Square Deal. On November 5, 1951, Dovberg made a delivery to Square Deal and Spivak told him that Pennsylvania Paste's drivers were spreading rumors that Dovberg was going out of business.[183] Soon after February 1955 Spivak told Dovberg that Flanagan had told him that "we would be out of business soon, that he ought to buy his products if he intended to continue to get his products after we were out of business."[184] Spivak at that time complained about Dovberg's prices and Dovberg had to cut it.[185] Following a delivery of Nix-Size in March, 1955, Spivak called Dovberg and told him he could get the same thing from Pennsylvania Paste for $2.70 a dozen. "He said Mr. Flanagan told him this is exactly the same thing, 'so why should I pay your company more when I can get the same thing from him for less.'"[186]

(j) Other companies that referred to the rumors about plaintiffs

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182. Tr. p. 416.
183. Tr. p. 414.
184. Tr. p. 419.
185. Tr. pp. 420-421.
186. Tr. p. 421.

going out of business were the Charles Wallpaper Company, Reliable Wallpaper Company and Stein Wallpaper Company.[187]

By the spring of 1952 there had been increases in the prices of raw materials and packaging items, and plaintiffs attempted to raise prices.[188] They were unable to effect the increase, as customers stated that Pennsylvania Paste's Flanagan had stated that he would not raise his price.[189]

In the spring of 1952 as well, Pennsylvania Paste changed its package of Liqui-Size to a Boston amber round bottle, quite similar to that of Nix-Size, and with essentially the same directions and instructions.[190]

On September 12, 1952, Dovberg wrote a letter to defendant Pennsylvania Paste, of which he has the return receipt.[191] The letter accused Pennsylvania Paste of copying plaintiffs' bottle and seeking to put them out of business.[192] At no time did plaintiffs receive any reply to the letter.[193] On March 11, 1955, Dovberg wrote a final letter to Flanagan, accusing him of "unfair business practices" and asking him once again to stop producing an imitation of Nix-Size.[194] He received no

187. Tr. p. 322.
188. Tr. pp. 423, 424.
189. Tr. p. 425.
190. Tr. p. 426.
191. Tr. p. 428.
192. Tr. pp. 429, 430, 431.
193. Tr. pp. 428-435.
194. Tr. p. 436.

reply to the letter.

At no time throughout the whole period involved in this case did plaintiffs receive any complaints from outside the Philadelphia area of their price for Nix-Size. Such complaints as were received were all in the Philadelphia area.[195]

3. Cellulose Based Paste

Late in 1951, plaintiffs began to market Calico Paste, a cellulose based paste. At that time Pennsylvania Paste Company had no such product on the market. In January 1952, Pennsylvania Paste put a competitive produce, Cellu-Stick, on the market;[196] package sizes of Cellu-Stick were similar[197] to that of Calico and its effect was to lessen Calico sales.

4. Costs of Production*

Plaintiffs paid approximately the same price as Pennsylvania Paste did for all items that went into Nix-Size. They bought caps, bottles, cello-seal

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* The extensive cross examination that was conducted on the issue of cost of production will not be considered here, as most of it is not relevant to the determination of the motions herein considered.

195. Tr. p. 453.
196. Tr. p. 451.
197. Tr. p. 452.

bands, for approximately the same price or less than Pennsylvania Paste.[198] Pennsylvania Paste purchased phenol for approximately the same price, and paid approximately the same amount for the filler substances in the formula.[199] The chemical formulae and compositions of Nix-Size and Liqui-Size are virtually the same.[200]

Sales of Nix-Size and Liqui-Size throughout the period involved were similar:

In 1950, Nix-Size sold $7,838.21;[201] Liqui-Size, $1,240.75.[202]

1951: Nix-Size, $13,028.58;
Liqui-Size, $5,113.66.
1952: Nix-Size, $7,461.77;
Liqui-Size, $7,332.82.
1953: Nix-Size, $7,716.84;
Liqui-Size, $5,425.95.[203]

1954: Nix-Size, $6,075.47;
Liqui-Size, $4,950.96.
1955: Nix-Size, $4,744.89;
Liqui-Size, $5,193.57.
1956: Nix-Size, $2,962.77;
Liqui-Size, $4,912.23.[204]

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198. Tr. p. 382.
199. Tr. pp. 384-396.
200. Tr. pp. 357-364.
201. Tr. p. 396.
202. Tr. p. 397.
203. Tr. pp. 397, 398.
204. Tr. p. 398.

Plaintiffs had fewer employees than Pennsylvania Paste.[205]

Plaintiffs' machinery was similar to that of Pennsylvania Paste.[206]

Both firms used a hand process to cap their products.[207]

Both used a hand process to put a cello-seal band around the top of the bottle.[208]

Both labelled the bottles by hand.[209]

Both had similar elevator conveyor systems.[210]

Both had similar boiler facilities.[211]

Both had the same amount of trucks.[212]

Plaintiffs paid no rent;[213] Pennsylvania Paste paid rent.[214]

Office expenses for plaintiffs were as low, or lower, than they could have

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205. Tr. pp. 399-401.
206. Tr. p. 401.
207. Tr. p. 402.
208. Tr. p. 403.
209. Tr. p. 403.
210. Tr. p. 404.
211. Tr. p. 404.
212. Tr. p. 406.
213. Tr. p. 405.
214. Tr. p. 406.

been for Pennsylvania Paste, since most of the office work was done for no salaries by Dovberg and his father alone.[215]

In 1951, Pennsylvania Paste's prices went down to $3.20 a dozen for gross purchases, and $3.50 a dozen for less than gross purchases. In November 1953, Pennsylvania Paste once again lowered the price to $3.00 a dozen, where as prices for ingredients, bottles, caps, and the like had remained the same or increased.[216] Salaries and expenses had increased.[217] A net profit was made by Pennsylvania Paste in 1952 on Liqui-Size; a loss was suffered in 1953 on Liqui-Size; a greater loss was suffered in 1954 on Liqui-Size. Throughout the period, Pennsylvania Paste kept its price the same while costs remained constant or increased.[218]

On the basis of this information and his knowledge of the trade, plaintiffs' Dovberg is convinced that Pennsylvania Paste sold his product for lower than cost in 1951,[219] and subsequent to that year.

In this period of time, other competitive products appeared, but none had a major part of the market or closely resembled Nix-Size until plaintiffs were on the verge of being forced out of business.[220]

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215. Tr. pp. 409-411.
216. Tr. pp. 439, 440.
217. Tr. p. 441.
218. Tr. p. 442.
219. Tr. p. 442.
220. Tr. p. 447.

5. Stipulations

There is no contention that Pennsylvania Paste imitated or impersonated wet paste products of plaintiffs.[221] There is no contention that Pennsylvania Paste imitated or impersonated dry paste products of plaintiffs.[222] There is no contention that Pennsylvania Paste attempted to monopolize cellulose based products.[223] The Cellu-Stick product, its manufacture and sale, is not alleged to be an overt act to prove the alleged conspiracy.[224]

There is no contention that the Liqui-Size label as such was copied from the Nix-Size label as such.[225] There is no contention that any sales of wet paste products, dry paste products, or non-staining cellulose products, by Pennsylvania Paste were for less than the cost of manufacture.

6. Miscellaneous Information

There were approximately five telephone calls between plaintiffs' Dovberg and Pennsylvania Paste's Flanagan. On September 12, 1950 Dovberg protested the possible release of a competitive product to Nix-Size; on October 19 and again in December, 1950, Dovberg protested the loss of his fiber drums. An additional call was made in the later

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221. Tr. p. 2252.
222. Tr. p. 2558.
223. Tr. p. 2575.
224. Tr. p. 2573.
225. Tr. p. 2816.

1950--early 1951 period, and in 1956 Dovberg called Flanagan to propose partnership.[226]

Flanagan visited plaintiffs' factory in the spring or summer of 1950,[227] and once again in the fall of 1950.[228] At both times, he identified himself as a representative of the Philadelphia Electric Company and asked various questions about Dovberg's business.

Dovberg had samples of Liqui-Size before October 12, 1950.[229]

There were other wall size eliminators on the market after Nix-Size and before Liqui-Size.[230]

Nix-Size sold as early as March 1950 on a fair-traded basis to the public at 65¢ per pint and to the trade at 50¢ per pint.[231] In March 1952[232] the price was increased to 85¢ per pint. This was the period in which Dovberg attempted to effect a general price increase.[233] Throughout the October 1950 to 1952 period, Liqui-Size was sold without a fair-traded price restriction;[234] plaintiffs kept Nix-Size fair-traded, at least to some customers[235] through 1954.[236]

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226. Tr. p. 2379.
227. Tr. p. 2363.
228. Tr. p. 2374.
229. Tr. p. 2395.
230. Tr. p. 2695, et seq.
231. Tr. p. 2843.
232. Tr. p. 2845.
233. Tr. p. 3010.
234. Tr. p. 2847
235. Tr. p. 3026.
236. Tr. p. 3025.

THREE

SAMUEL SCHULTZ & CO.: Another defendant

I. ANALYSIS

A. THE CHARGES

1. Schultz is charged with "discontinuing and refusing to resume ... [his] purchases of wall size eliminator" from plaintiffs, "with knowledge of Pennsylvania Paste's intent" to drive plaintiffs out of business.[237]

Evidence has been introduced of Schultz' discontinuance of purchases from plaintiffs and his refusal to resume purchases.[238] Evidence has also been introduced to the effect that plaintiffs' Dovberg told Schultz of Pennsylvania Paste's alleged intent and that Schultz was aware of it.[239]

2. Schultz is charged with having "induced United Wallpaper Co. to imitate and sell an imitation of plaintiffs' cellulose paste."[240]

Evidence has been introduced that plaintiffs' Dovberg demonstrated Calico

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237. Statement of Contentions, p. 8.
238. Tr. pp. 549, 541, 501.
239. Tr. pp. 475, 550, 552, 553.
240. Statement of Contentions, p. 9.

to the wallpaper trade, one of the largest in the Philadelphia area.[245] It claims by advertisement to be the largest wallpaper and paint store in the Philadelphia area.[246] Everywhere plaintiffs' Dovberg went, almost all of his customers had Samuel Schultz' line, his sample books, and his stock.[247]

Schultz purchased from plaintiffs from 1949 to 1952[248] and was one of Dovberg's biggest and best customers.[249] In 1949, Dovberg visited Schultz at his office and told him he was the inventor of Nix-Size.[250] Schultz began purchasing Nix-Size in 1949.[251] Plaintiffs' total sales of Nix-Size in 1950 were $7,828.21.[252] [This figure covers the period from June through the end of the year.][253] Plaintiffs' volume of sales in all of 1950 with Samuel Schultz & Co. was $2,232.60.[254]

About August 11, 1950, plaintiffs began to charge Schultz the distributor's price.[255] Such price for Nix-Size was $42 a gross, Schultz being allowed "the usual discount on the gross price purchase, an additional 10% discount and a bonus, a fractional bonus plus his 2% discount."[256]

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245. Tr. p. 463.
246. Tr. p. 460, PX 99.
247. Tr. pp. 463-464.
248. Tr. p. 464.
249. Tr. p. 465.
250. Tr. p. 470.
251. Tr. pp. 471-472.
252. Tr. p. 465.
253. Tr. p. 466.
254. Tr.p.469.
255. Tr.p.487.
256. Tr.p.490-491.

Late in 1950[257] plaintiffs received complaints from the National Paint & Wallpaper Company, Mr. Lebowitz, Ralph Schultz, Castle Wallpaper, and Greenstein Wallpaper[258] that Samuel Schultz was selling Nix-Size for 25¢ and 35¢ a pint,[259] although the product was fair-traded for 65¢ a pint.[260] Plaintiffs' Dovberg complained to Schultz, told him plaintiffs were receiving complaints, "that these complaints were generating bad feeling among our customers in the stores, and that they were asking me to cut our prices ... so that they could compete against Sam Schultz ..."[261] Sam Schultz said, "I buy your Nix-Size, I pay for it, and I can do anything I want with it. I don't care about this one or that one or anybody. I only care about Sam Schultz."[262] This conversation took place late in 1950,[263] the year Schultz purchased $2,232.60 worth of Nix-Size. in 1951 Schultz purchased $240.00 worth of Nix-Size.

On December 2, 1950[264] plaintiffs' Dovberg was making a delivery to the Camden Wallpaper store, allegedly owned by Samuel Schultz & Co. and he observed[265] some empty gallon cans which had contained Nix-Size. Near them were small

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257. Tr. p. 501.
258. Tr. p. 491.
259. Tr. p. 492.
260. Tr. p. 489.
261. Tr. p. 501.
262. Tr. p. 501.
263. Tr. p. 501.
264. Tr. p. 524.
265. Tr. p. 525.

cans with a label on them reading "Magic Liquid Size."[266] He picked up one of these small cans and observed directions on it "exactly what we gave on our Nix-Size package."[267] The manager of the store told him, "That's great stuff, that Nix-Size; that's a great product. We put Nix-Size in these cans and we put our label on the cans, but it's Nix-Size." And I asked him, "Why do you do this when they have small packages, pints smaller sizes," and he said, "Well, the boss likes to sell products under his own label. For years we have sold products under the name of Liquid Size; that's the trade name of Samuel Schultz & Co. and customers believe that whatever products we sell under the Magic label is our exclusive products."[268]

On June 26, 1951,[269] plaintiffs made a delivery to Samuel Schultz store on Front Street and Dovberg observed empty gallon cans of Nix-Size, as he had in the Camden store. He told Iz Kaplan, Sam Schultz' son-in-law and partner,[270] that Schultz & Co. was taking Nix-Size from "our gallons and they were putting it in their package under their exclusive label." Kaplan said that Dovberg would have to discuss this with Schultz personally,[271] but Dovberg did not.[272] He did note that the Magic Liquid Size was being sold for 50¢ and Nix-Size for 65¢.[273]

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266. Tr. p. 525.
267. Tr. p. 525.
268. Tr. pp. 525-526.
269. Tr. p. 530.
270. Tr. p. 531.
271. Tr. p. 531.
272. Tr. p. 532.
273. Tr. p. 532.

On November 19, 1951 Dovberg had a conversation with Schultz[274] in which the latter told him "that Mr. Flanagan had visited his store and that he was gunning [sic] mad because Sam Schultz was buying our wet paste, and Sam Schultz said: 'Dovberg, if you fellows continue to sell wet paste, this fellow could put you out of business. He is just the fellow who can do it.'"[275] [Wet paste products had been purchased by Schultz from August 25, 1950 through October 28, 1950.][276]

In December 1951 Dovberg observed that the North Front Street store of Samuel Schultz had a new display in the window.[277] Schultz had always prominently displayed Nix-Size and now Nix-Size was relegated to a lesser position with Magic Liquid Size and Liqui-Size also being displayed in the window.[278]

On March 13, 1952 Dovberg had a conversation with Sam Schultz[279] of which he made a memorandum the following day.[280] Schultz called him on the telephone, a call received at plaintiffs' factory.[281] Schultz told him that Flanagan had just left a sample there like Nix-Size, "exactly the same as your

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274. Tr. pp. 482, 487.
275. Tr. p. 475.
276. Tr. p. 475.
277. Tr. p. 532.
278. Tr. p. 540.
279. Tr. p. 548.
280. Tr. p. 544.
281. Tr. p. 548.

Nix-Size."[282] Schultz said he had a contract on his desk from Pennsylvania Paste and that when he signed it he would stop buying Nix-Size. He said he had tried "Pennsylvania's Nix-Size, that's how he referred to it," and found it to be exactly the same as plaintiffs' Nix-Size. "Mr. Flanagan, said Schultz, is going to sell it to me for much less than what I can get it from you." Dovberg told Schultz that he had patents pending, that his product had been licensed to no one, that he didn't believe Mr. Flanagan could sell an imitation at a lesser price[283] "unless he was enforcing the threat that he had made to me that he would produce the same products, sell it for less or below the cost that I could afford to sell ours, in an effort to put us out of business; and I told Sam Schultz that if he sold Mr. Flanagan's manufactured product under his exclusive label and if they did anything in joining in an effort, combined, to hurt our business that I would have to hold Mr. Schultz as responsible as I would the Pennsylvania Paste Company if they damaged our business. Schultz laughed and said, 'It was nice doing business with you, kid.'"

On March 13, 1952, Dovberg wrote a letter[284] to Samuel Schultz, to which he received no reply.[285] The first three paragraphs of the letter read:

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282. Tr. p. 549.
283. Tr. p. 550.
284. PX 106.
285. Tr. p. 551.

"In reply to you to our conversation to-day, I wish to advise that I profoundly regret your statement to me, that after using up your present stock of Nix-Size, you will not purchase our product for resale anymore. I am mostly shocked to believe from your statement, that you are preparing to negotiate a contract with a Company - who is going to package a product for you under your own label and Name, which is exactly like Nix-Size, our Wallsize eliminator, and does exactly what we claim Nix-Size does.

"It is difficult to believe that any Product other than Nix-Size can or will do what Nix-Size was created to do. But, by your own statement, you assured me, that as a Former Paperhanger with many years of experience, you have tested this product with remarkable results and in the proving have found it to be like Nix-Size in every respect.

"I honestly admit, that I am shocked to know that you, the S. Schultz Wallpaper & Paint Company, Our largest buyer and largest account in Philadelphia, who has until now - sold more Nix-Size and Jobbed same than any concern connected with us, will stop business associations with us - for the sake of accepting a similar Product as Nix-Size at a lesser Price."[286]

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286. Tr. pp. 552-553.

Dovberg's price for orders of five gross or more of Nix-Size on March 13, 1952 was $4.95 a dozen.[287] Pennsylvania Paste's prices for their competing products from April 4, 1952 to December 23, 1957 varied from between $2.40 to $2.85 a dozen. It is stipulated that Pennsylvania Paste packaged Magic Coat Liquid Size for Samuel Schultz & Co., a bottle of which[288] is a representative sample.[289]

Late in 1952, sometime after September 22nd, Dovberg noted an advertisement[290] of Samuel Schultz & Co. for Magic Liquid Size. He went into Schultz' Front Street store[291] and observed a bottle of Nix-Size marked down to 35¢, though Dovberg had advertised it for sale at 65¢. Magic Coat Liquid Size was then selling for 50¢.[292] Dovberg spoke to Iz Kaplan and complained about the fact[293] "that dealers were complaining that Sam Schultz was using Nix-Size as a decoy and selling an imitation of our product. He assured me that they would remove it (the lower price quotation), that he would discuss it with Sam Schultz and that they would remove that price quotation, and later they did."[294]

On June 29, 1953, Dovberg wrote a

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287. Tr. p. 574.
288. PX 108.
289. Tr. p. 592.
290. PX 99.
291. Tr. p. 570.
292. Tr. p. 570.
293. Tr. p. 571.
294. Tr. p. 571.

letter to Sam Schultz[295] soliciting business. After that date he continued mailing various solicitations to do business to Schultz & Co.[296]

Cellulose Base Paste

In the fall of 1951 plaintiffs' Dovberg went to Samuel Schultz' office.[297] Schultz told him of the difficulties in the wallpaper trade with flour based pastes staining the new solid color wallpapers.[298] Dovberg told Schultz of cellulose base paste and showed him a sample of it.[299] Dovberg showed him Calico Paste, told him he had invented it, and stressed the advantage of cellulose over flour as a base.[300] Schultz turned to his associate, Marvin Spiro, and said: "If this paste will do what Dovberg says it will do, there ought to be an important need for--there is an important need for such a product, and I believe we could sell quite a good bit of it."[301] Schultz and Spiro told Dovberg that they would bring Calico to a wallpaper convention the following week and attempt to interest United Wallpaper Co. in it.[302] Schultz told him, "If United Wallpaper accepted this product, if they liked it, they would probably get in touch with us and have us manufacture this product for their needs or their distribution."[303]

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295. Tr. p. 577.
296. Tr. p. 578.
297. Tr. p. 1463.
298. Tr. pp. 1460-1461.
299. Tr. p. 1462.
300. Tr. p. 1462.
301. Tr. p. 1462.
302. Tr. p. 1463.
303. Tr. p. 1464.

Dovberg never heard from Schultz again about the matter and never asked him about it;[304] he never heard from United Wallpaper Co.[305]

Schultz is a major distributor of United Wallpaper Co., the largest such concern in the world,[306] and the exclusive distributor in the Philadelphia area of Nancy Warren United Wallpaper Products. Dovberg has examined Nancy Warren non-staining paste and it has the same physical appearance as his Calico Paste and performed the same as Calico Paste.[307]

A schedule[308] of Dow's sales of Methocel to United Wallpaper indicates that Dow first sold Methocel CAM to United Wallpaper in January 1951 in the amount of 50 pounds.[309] The second sale was in December 1951 for 28 pounds;[310] the third sale in February 1952 for 10,812 pounds.

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304. Tr. p. 1466.
305. Tr. p. 1468.
306. Tr. p. 597.
307. Tr. p. 602.
308. PX 139.
309. Tr. pp. 1468, 1469.
310. Tr. p. 1469.

FOUR

ATLAS WALLPAPER CO.: Another defendant

I. ANALYSIS

A. THE CHARGES

Atlas is charged with (1) "discontinuing and refusing to resume their purchases of wall size eliminator,"[311] (2) "knowledge of Pennsylvania Paste's intent to drive plaintiffs out of business,"[312] and (3) "selling a wall size eliminator purchased from Pennsylvania Paste 'as being, or being the same thing as,' Nix-Size."[313]

1. Evidence has been introduced to show Atlas' cessation of purchases of Nix-Size from plaintiffs.[314]

2. Evidence has been introduced indicating that plaintiffs informed Atlas of Pennsylvania Paste's alleged intent.[315]

3. Apparently plaintiffs no longer charge that Atlas sold anything purchased from Pennsylvania Paste "as being, or being the same thing as" Nix-Size, as they concede that Pennsylvania Paste was not, in fact, the manufacturer of Atlas Liquid Size.[316] Nor has any evidence

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311. Statement of Contentions, p. 8.
312. Statement of Contentions, p. 8.
313. Statement of Contentions, p. 9
314. Tr. p. 648.
315. Tr. pp. 664, 676, 677.
316. Tr. p. 3472.

been introduced that Atlas' Liquid Size was sold as Nix-Size. Indeed, the only direct testimony on point is to the contrary.[317] The only evidence adduced for plaintiffs on this point is the testimony of William Dovberg, brother of plaintiffs Maurice Dovberg, that Manny Katz of Atlas told him that Atlas Liquid Size was Nix-Size.[318] This statement allegedly made by Katz followed a sale from Katz to a customer in which Katz, according to William Dovberg, had compared Atlas Liquid Size to Nix-Size, and came as a result of William Dovberg's complaint that Nix-Size had not been recommended to the customer.[319]

B. COMMENTS

The case against Atlas is weak. Assuming Atlas' knowledge of Pennsylvania Paste's alleged intent, and assuming Atlas' discontinuance of business with the plaintiffs, as charged by plaintiffs, no direct case is made against Atlas, unless the jury is also convinced that Atlas claimed or sold Atlas Liquid Size as being the same thing as Nix-Size. Without the third charged overt act, the first two can hardly be sufficient grounds to prove conspiracy. Even with the third, however, plaintiffs are faced with serious problems. For, as charges against Atlas drift farther away from acts of Pennsylvania Paste, evidence against Atlas becomes weaker.

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317. Testimony of R. Applebaum, Tr. pp. 4051, 4118.
318. Tr. pp. 4356, 4402, 4403.
319. Tr. pp. 4355-4357.

At best, the charge now is that defendants sold a wall size eliminator made for them by a company not involved in this suit, with defendant's knowledge that such sale would harm plaintiffs, and defendant's knowledge that Pennsylvania Paste was attempting to put plaintiffs out of business. There is, in addition, minimal evidence that Atlas intended to contribute in whatever way it could to help put plaintiffs out of business.[319a] Whether this is sufficient to constitute a prima facie case against Atlas is dubious.

II. SUMMA OF DIRECT TESTIMONY RE DEFENDANT ATLAS WALLPAPER CO.

Atlas Wallpaper Co. was mainly in the "jobber and distributing business" of wallpaper and related products.[319b] While Atlas was a distributor of wallpaper during the period in question in the suit, it sold wall size eliminator and wallpaper paste products primarily on a retail basis.[320] Manny Katz was the manager of Atlas.

A. WET PASTE PRODUCTS

Plaintiffs never sold wet paste to Atlas. Dovberg attempted to, but Katz

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319a. Tr. p. 646; infra, p. 62.
319b. Tr. p. 617.
320. Tr. p. 619.

told him he had a special arrangement with Pennsylvania Paste "that he wouldn't or couldn't sell anybody else's wet paste and this was the reason why he couldn't buy wet paste from me."[321] This conversation took place during the early period of business between Atlas and plaintiffs.

B. NIX-SIZE

Plaintiffs sold Nix-Size to Atlas from February 11, 1950 through May 20, 1953.[322] The first order came about after Katz called and ordered one gross of pint size Nix-Size. When plaintiffs' Dovberg delivered it, Katz said, "You know, you have a wonderful product -- I heard a lot about it -- but I really shouldn't buy from you. In fact, I don't know why I am buying it."[323] Katz explained that the reason for his hesitancy in doing business was that Dovberg's brother, Bill, owed Katz a sum of money. Upon Maurice Dovberg's promise to pay his brother's debt, Katz was willing to continue in a business relationship.[324]

Purchases increased through 1950 and Katz "told me on a couple of occasions that this was a great product, that it was a very fast selling item, and that everybody asked for it, everybody liked it, and he felt he could do a very good job distributing it."[325]

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321. Tr. p. 636.
322. Tr. pp. 621, 622.
323. Tr. p. 625.
324. Tr. p. 626.
325. Tr. p. 627.

On August 30, 1950 plaintiffs' Dovberg made a delivery to Katz who told him "he would like me to package under his label, his exclusive label. I explained to Manny Katz that I had a patent pending and that I couldn't consider it at that time, but, at any rate we left that matter just as it was."[326]

On October 30, 1951 Katz asked Dovberg to stop selling Nix-Size to the Charles Wallpaper Co., a competitor located on the next block to Atlas. Dovberg told Katz that he sold to anyone who ordered from him. Katz warned "that he has connections with big distributors, big manufacturers, that he could hurt me, that he would even be willing, if I didn't stop selling to his competitor, to procure an imitation of our product, of Nix-Size, and sell it as such in an effort to hurt me, and he would contribute in whatever way he could to help put us out of business."[327]

On December 21, 1951 (this date is uncertain) plaintiffs' Dovberg noted "Manny is very enthused about Nix-Size. He says the product is great and was an excellent repeater."[328]

On November 21, 1952 plaintiffs' Dovberg made a delivery to Atlas; at that time Katz "told me that he was selling an imitation of our Nix-Size, that it even smelled like our Nix-Size, and I recall cautioning him that we had patents pending, that we hand't licensed anyone to

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326. Tr. pp. 628, 628a
327. Tr. p. 648.
328. Tr. p. 635.

sell any imitation of our Nix-Size..."[329] Katz told Dovberg that he, Katz, would eventually use up his current supply of Nix-Size. "He also dictated to me how much he would pay for Nix-Size and demanded that I sell it to him at his price."[330]

On March 10, 1953, Katz told Dovberg that he did not wish to buy Nix-Size any more because the Charles Wallpaper Co. was selling it. He wanted to sell No-Size, Nix-Size under a different label, instead.[331] In the midst of the conversation, Katz was called to the back of the store and Mr. Saraco of Atlas told Dovberg that Katz was considering putting a product just like Nix-Size on the market soon under his own label.[332]

Katz made his final purchase from plaintiffs on May 20, 1953.[333]

At no time throughout the period of sales did Katz ever complain about the physical properties of Nix-Size until, close to the end of the business relationship, he complained that Nix-Size showed excessive precipitation. Dovberg notes, however, that the directions on Nix-Size say that it should be shaken well and that all similar products also precipitate if not shaken.[334]

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329. Tr. pp. 650, 651.
330. Tr. p. 652.
331. Tr. p. 657.
332. Tr. p. 658.
333. Tr. p. 660.
334. Tr. p. 637.

In the spring of 1954 Dovberg was driving home from a baseball game when he noted someone continually bumping his car from behind.[335] The next morning he received a call from Katz in which the latter told him that he was bumping me," that he called "to tell you that you are a big schmuck ... I told you ... to stop selling ... Charles Wallpaper Co. I asked you not to sell him Nix-Size. You wouldn't listen and now I am telling you that I am having manufactured for me a wall size eliminator just like your Nix-Size under my exclusive label, and I am going to tell the people who buy this product that it is your Nix-Size." Katz stated that he would even attempt to make the product smell the same.[336] Dovberg told Katz that "Mr. Flanagan ... told me or threatened me that he was going to produce an exact duplication of our Nix-Size and sell it below cost, if necessary, for the express purpose, of putting us, the Paste Company of America, out of business, and if you market an imitation of our product under your exclusive label, and tell people that this is Nix-Size, and if you go along with Mr. Flanagan in his effort to put us out of business, if you hurt us, I am going to hold you as responsible as I will Mr. Flanagan of the Pennsylvania Paste Company..."[337]

Soon after the conversation Dovberg obtained a jar of Atlas' Liquid Size,[338] Atlas' competitive product

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335. Tr. pp. 661, 662.
336. Tr. p. 663.
337. Tr. p. 664.
338. Tr. p. 667.

to Nix-Size. Directions on it are similar to those on Nix-Size.[339]

On December 18, 1956 Dovberg wrote a non-registered letter to Katz to which he never received any reply.[340] The first three paragraphs of it read:

> "I learned during the height of the season this year that you have sold quite a lot of an imitation of Nix-Size to people who have requested our Nix-Size, by telling all that your Atlas Wall Size Eliminator was Nix-Size packaged for you under your own label.
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> "Such reports coming from you would not surprise me in the least, since already did tell me that Mr. Flanagan is going to put me out of business and that you would help him do it, because I refused to sell your competitor Charles Wallpaper Company, any product under some other label to give you control of Nix-Size on South Street and your stores. Further, since you demanded that I stop selling him any goods altogether.
>
> "I also learned that your co-workers including your younger brother were also telling customers that your imitation of Nix-Size was the original Nix-Size product under your label and manufactured for you by the Paste Company of America. Such lies and misrepresentations is causing you

339. Tr. p. 668.
340. Tr. p. 670.

to cooperate with our competitor who has stated that he will put into effect through the cooperation of local wallpaper stores, actions which will bring about the collapse of our business."[341]

C. CROSS AND RE-DIRECT EXAMINATION

Dovberg only learned after his depositions were taken in 1959 that Jacone and not Pennsylvania Paste was the manufacturer of Atlas Liquid Size.[342] Some time between 1950-53 Katz told Dovberg that he could get Liqui-Size from Flanagan for a lesser price packaged under Atlas' label. This is the reason why he believed Flanagan made Atlas' Wall Size Eliminator for it.[343]

Dovberg does not know how much wet paste Atlas ever bought[344] nor does he know how much Cellu-Stick was purchased by Atlas.[345] Aside from discovery procedures, Dovberg did not know how much Liqui-Size Atlas bought from Pennsylvania Paste.[346] Atlas' total purchase of Liqui-Size from Pennsylvania Paste was $32.42;[347] Atlas' total purchases from plaintiffs was $1489.90.[348]

Dovberg believes that Katz' most important motive in wanting No-Size was

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341. Tr. pp. 676, 677.
342. Tr. p. 3472.
343. Tr. p. 681
344. Tr. p. 3432.
345. Tr. p. 3433.
346. Tr. p. 3433.
347. Tr. p. 3655.
348. Tr. p. 3658.

"he seemed to feel like he wanted a product under his own label."[349] Katz also wanted to sell something that Charles Wallpaper Co. did not have.[350]

Dovberg's alleged 1954 conversation with Katz follows Atlas' commencing to purchase Atlas Liquid Size from Jacone by a couple of months.[351] Dovberg sent a private investigator to one of Atlas' stores in March 1958. The investigator asked for Nix-Size, was told that Atlas did not have it, but that it had a similar product which was far superior.[352]

At no time throughout the period, did any patent counsel ever advise Dovberg that anyone was infringing on his patent.[353]

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349. Tr. p. 3436.
350. Tr. p. 3437.
351. Tr. p. 3472.
352. Tr. p. 3467.
353. Tr. p. 3686.

CONCLUSIONS SUR MOTIONS FOR DIRECTED VERDICT

As the case proceeded, and up to and since plaintiffs rested, the entire daily record in the case at bar has been studied. The whole area of plaintiffs' case is pretty thin, but not enough for me to hear the ice cracking. This is no time to weigh and evaluate disputed evidence, for this is not a judge's function in determining a motion for a directed verdict. Neither is it a time to make nice legal distinctions and refined analyses of proof as to what may or may not constitute sufficient proof or lack of it to sustain violation of the antitrust statutes. At the outset, it was noted, to direct a verdict the judge must be certain as a matter of law plaintiffs' proof is so totally lacking there could be no rational basis for permitting the jury to look at the evidence. In truth, this means there is no proof, or, at least, such a meagre proof that the prima facie case has not been met. On the basis of the voluminous record before me, as I have referred to parts of it at length, supra, I am not prepared, at this time, to rule, as a matter of law, that it is clear defendants should have their verdicts:

1. Dow Chemical Company

Almost all evidence presented by plaintiffs as to Dow's alleged motive

has been negated. Unlike the wholesaler defendant, Pennsylvania Paste, Dow was not a competitor of plaintiffs. Unlike the retailer defendants, Dow had no direct contact with the wholesaler, Pennsylvania Paste, no conceivable reason to win its favor, and no apparent purpose in helping to force plaintiffs out of business.

All evidence presented by plaintiffs as to prices paid by competitors to Dow is negated by plaintiffs' courtroom admission that Methocel CAM and Methocel MCNF are different products, with different degrees of viscosity. Plaintiffs' apparent allegation that Dow failed to encourage them sufficiently to purchase Methocel MCNF is a likewise legally thin base from which any conspiratorial inference may be drawn by the jury.

Plaintiffs' evidence as to credit terms is legally slight to raise any jury question. Plaintiffs were in debt to Dow when Dow cut off credit, after allowing plaintiffs 30-day credit for approximately one year. Plaintiffs offer no evidence of substance that Dow treated any other customer of comparative size and financial reliability differently than it treated plaintiffs.

At best, evidence has been adduced to support the following inferences: Dow knew of Pennsylvania Paste's alleged intent; Dow knew of the importance of methylcellulose to plaintiffs' business; Dow sold the plaintiffs in small amounts;

Dow took the plaintiffs off 30-days credit. Taken together, this places Dow in a position where the jury may draw inferences[354] that Dow is a party who knowingly acted in pursuance of a conspiracy. But whether Dow stands without contact with Pennsylvania Paste, without reason to aid Pennsylvania Paste, this is for the jury to find.

Dow's motion is denied.

2. Pennsylvania Paste

Pennsylvania Paste's motion is denied. A sufficient quantum of evidence has been adduced by plaintiffs to allow the case against this defendant to go to the jury. Evidence has been adduced, for example, as to alleged statements of Mr. Flanagan, of Pennsylvania Paste's intent to force plaintiffs out of business; of Pennsylvania Paste placing on the market Liqui-Size with the intent to force plaintiffs out of business; of Pennsylvania Paste's costs being the same or higher than those of plaintiffs; of Pennsylvania Paste selling its product for prices below cost; of Pennsylvania Paste taking butter tubs belonging to plaintiffs. In short, sufficient factual

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354. The Court makes no finding or decision at this point, whether all the evidence would support the finding of any inference-fact in the trial of the case at bar.

questions have been presented by plaintiffs to allow the jury to rule on the issues.

3. Samuel Schultz & Co.

Schultz's motion is denied. Evidence has been adduced that Schultz knew of Pennsylvania Paste's illegal aim; that Schultz acted in furtherance of it by selling the wall size eliminator purchased from Pennsylvania Paste as being, or being the same thing as, Nix-Size. Of itself, such evidence is legally sufficient to allow the jury to rule on the allegations.

4. Atlas Wallpaper & Paint Co.

Atlas' motion is denied. Though the case against Atlas is sufficiently frail to stir grave doubts as to its legal sufficiency, as already suggested, supra, plaintiffs have presented evidence from which the jury may infer that Atlas knew of Pennsylvania Paste's alleged illegal intent; that Atlas intended to contribute to it; that the form Atlas took to contribute to it was to cease purchasing from plaintiffs. On the basis of such evidence and the heavy weight of legal presumption against granting the motion, the motion is denied.

5. Empire Wallpaper & Paint Co.

At the commencement of the trial

of the cause, plaintiffs' counsel stated that no proof would be adduced as against Samuel Milkis, t/a Empire Wallpaper & Paint Co.[355] No evidence of any kind has been offered against this named defendant. Accordingly, the motion for directed verdict as to Samuel Milkis, t/a Empire Wallpaper & Paint Co. will be granted.

It may be added that all defendants argue that no evidence has been introduced as to acts which occurred within the four-year period prior to the commencement of this suit on September 25, 1954. In conformity with the opinion denying summary judgment for defendants, 195 F.Supp. 337, much evidence directed to the alleged conspiracy and the attempts of Pennsylvania Paste to dominate and preserve its position in the particular line of commerce was allowed to be offered covering the period before the year 1954--the time when the statute of limitations began to operate; but evidence was introduced of events occurring after that time which were either in the nature of overt acts or presented fact situations from which the jury might arrive at inferences that the alleged conspiracy and the attempt to preserve the market were still operative. For example, evidence was admitted of orders placed by buyers after the 1954 date and which plaintiffs were forced to refuse because of the alleged results of the charged conspiracy. Other instances

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355. Tr. p. 607.

of circumstances concerning the active state of the alleged conspiracy likewise occurred post 1954 which may be brought to the jury's attention at summation. At this time, therefore, the argument of defendants is not persuasive that the motions should be granted on the basis of the statute of limitations as a matter of law.

Professor Moore has stated[356] when the Court has any doubts as to whether to grant a motion for a directed verdict, the better practice is not to direct, but to reserve decision and let the jury bring in a verdict. Judge Frank was of the same view and wrote[357] that as to trial judges it may be suggested -

> ..."that, generally speaking... although there may be exceptions-- it is desirable not to direct a verdict at the close of the evidence, but to reserve decisions on any matter therefor and allow the jury to bring in a verdict ..."

Under this procedure the nisi prius judge is in a position to consider a post verdict motion under FR 50(b) and he can set the verdict aside, if he thinks it improper, and grant judgment notwithstanding the verdict, for a motion for such

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356. 5 Moore, op. cit. p. 2320.
357. Fratta v. Grace Line, Inc., 2 cir., 139 F.2d. 743, 744.

judgment in accordance with a movant's motion for a directed verdict is, of course, to be tested by the same legal standards as well as to see if the proofs are in equipose and where the preponderance of the evidence rests, and whether plaintiffs' burden of credible proof has been established. The ratio behind the cases which have decided that directed verdicts should only be utilized in the exceptional case is that crucial issues of fact and the inferences to be drawn from the evidence must be considered in the light most favorable to the party against whom the motion is directed.[358] This is so, even though the judge may not believe the evidence of may think that the weight of the credible evidence is on the other side, for under the constitutional guaranty of jury trial, it is for the jury first to weigh the evidence.[359] At another time, Judge Frank said: "It is unfortunate that (especially after a long trial) the judge took the case

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358. Atlas Building Prod. Co. v. Diamond Block & Gravel Co., 10 cir., 269 F.2d 950; Sattler v. Great Atlantic & Pacific Tea Co., W.D. La., 18 FRD 271.

359. Roedegir v. Phillips, 4 cir., 85 F.2d 995.

from the jury."[360]

All motions for directed verdicts, except of Empire Wallpaper & Paint Co., are denied.

Dated: February 21, 1962.

At Philadelphia.

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360. Linderman v. Textron, Inc., 2 cir., 229 F.2d 273. See, too, Saunders v. Pool Shipping Co., 8 cir., 235 F.2d 729; Craighead v. Missouri Pac. Transp. Co., 8 cir., 195 F.2d 652.